

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

STATE OF TEXAS, *et al.*,

Plaintiffs,

V.

Case No. 1:18-CV-68

UNITED STATES OF AMERICA, *et al.*,

Defendants,

and

KARLA PEREZ, *et al.*,

Defendant-Intervenors,

**DEFENDANT-INTERVENORS' APPENDIX
IN SUPPORT OF THEIR REPLY BRIEF IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

VOLUME 1

Exhibits A–B

Dated: April 27, 2023

Respectfully Submitted,

**MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND**

By: /s/ Nina Perales

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| Exhibit | Description/Source | Vol. No. |
|---------|---------------------------------------------------------------------------------------------------|----------|
| A | March 4, 2019, letter from Todd Lawrence Disher to Jack Salmon | 1 |
| B | Oral argument transcript in <i>Texas v. United States</i> , No. 21-40680 (5th Cir., July 6, 2022) | 1 |

Exhibit A



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 4, 2019

Jack Salmon
Staff Attorney
MALDEF
110 Broadway, Suite 300
San Antonio, TX 78205

Re: *Texas, et al. v. United States, et al.*, No. 1:18-cv-00068

Dear Mr. Salmon:

I write in response to your two letters dated February 1, 2019.

First, Plaintiff States' discovery requests do not require supplementation, as there are no genuine issues of material fact that require additional development before the Court can rule on Plaintiff States' claims as a matter of law.

The requests cited in your letter seek information regarding various categories of costs incurred by Plaintiff States as a result of the Deferred Action for Childhood Arrivals ("DACA") program. Because Plaintiff States are not seeking to recover monetary damages for the harms they have suffered from DACA, Plaintiff States must merely prove *some* injury to support their standing to bring this lawsuit. *See* ECF No. 319 at 50.

As explained in Plaintiff States' brief in support of their motion for summary judgment, the Court has already ruled that Plaintiff States have suffered injuries sufficient to establish their standing. *See* ECF No. 357 at 21-30. That ruling is based on legal principles and evidence that is properly in the record and before this Court. And much of Plaintiff States' evidence is corroborated by Defendant-Intervenors' own witnesses. *See, e.g.*, ECF No. 319 at 51 ("Finally, and perhaps most importantly for this topic, Defendant-Intervenors' own witness directly connected the dots for the Plaintiff States."). As such, there are no genuine issues as to any material facts regarding Plaintiff States' standing, so additional discovery on Plaintiff States' standing is not proportional to the needs of this case and outside the scope of discovery. *See* Fed. R. Civ. P. 26(b)(1).

Defendant-Intervenors have filed a motion pursuant to Federal Rule of Civil Procedure 56(d), claiming that additional discovery is needed before the Court can rule on Plaintiff States' motion for summary judgment. ECF No. 363. Plaintiff States will file a response in opposition to that motion setting forth why the requested

Jack Salmon
March 4, 2018
Page 2

additional discovery is not needed. The parties can discuss whether supplementing discovery responses is needed should the Court rule that additional discovery is required on Plaintiff States' standing.

Second, you also reference the Court's Order excluding certain declarations from the *Texas I* litigation. *See* ECF No. 318. Consistent with my representations to you in the past, Plaintiff States do not intend to rely on those declarations at this time.

Sincerely,

Todd Lawrence Disher
Trial Counsel for Civil Litigation
Office of the Attorney General of Texas

Attorney-in-Charge for Plaintiff States

Exhibit B

No. 21-40680

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

State of Texas; State of Alabama; State of Arkansas;
State of Louisiana; State of Nebraska; State of South
Carolina; State of West Virginia; State of Kansas; State
of Mississippi,

Plaintiffs - Appellees,

versus

United States of America; Alejandro Mayorkas, Secretary,
U.S. Department of Homeland Security; Troy Miller, Acting
Commissioner, U.S. Customs and Border Protection;
Tae D. Johnson, Acting Director of U.S. Immigration and
Customs Enforcement; Ur M. Jaddou, Director of U.S.
Citizenship and Immigration Services,

Defendants - Appellants,

Elizabeth Diaz; Jose Magana-Salgado; Karina Ruiz De Diaz;
Jin Park; Denise Romero; Angel Silva; Moses Kamau Chege;
Hyo-Won Jeon; Blanca Gonzalez; Maria Rocha; Maria Diaz;
Elly Marisol Estrada; Darwin Velasquez; Oscar Alvarez;
Luis A. Rafael; Nanci J. Palacios Godinez; Jung Woo Kim;
Carlos Aguilar Gonzalez; State of New Jersey,

Intervenor Defendants - Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Brownsville Division

WEDNESDAY, JULY 6, 2022

BEFORE PANEL:

CHIEF JUDGE PRISCILLA RICHMAN
JUDGE JAMES C. HO

JUDGE KURT D. ENGELHARDT

1 APPEARANCES:

2 FOR THE UNITED STATES:

3 UNITED STATES DEPARTMENT OF JUSTICE

4 By: Brian Boynton

5
6 FOR DACA RECIPIENT APPELLANTS:

7 MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATIONAL FUND
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San Antonio, Texas 78205
(210) 224-5476

9 By: Nina Perales

10
11 FOR THE STATE OF NEW JERSEY:

12 NEW JERSEY OFFICE OF ATTORNEY GENERAL

13 By: Jeremy Feigenbaum

14 FOR THE STATE OF TEXAS:

15 TEXAS OFFICE OF THE ATTORNEY GENERAL

16 By: Judd Edward Stone, II
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1 CHIEF JUDGE RICHMAN: The next case on our
2 docket is 21-40680, the State of Texas versus the United
3 States.

4 Mr. Boynton.

5 MR. BOYNTON: Good morning, Your Honor, and
6 may it please the Court, Brian Boynton for the United
7 States. I've reserved 4 minutes for rebuttal.

8 The 2012 DACA memorandum challenged in this
9 case is lawful in its entirety and should be upheld.
10 This Court should reverse the district court's grant of
11 summary judgment for the plaintiff states and vacate the
12 injunction against DACA.

13 I'd like to start first with standing. The
14 plaintiffs have failed to meet their burden of
15 establishing Article III standing. This case is very
16 similar to the Crane v Johnson case decided by this
17 Court, where the Court found that Mississippi had failed
18 to meet its burden to establish standing. Mississippi,
19 like the plaintiffs here, was resting on an assertion
20 that DACA caused the state to spend more for social
21 services generally. But Mississippi had not put in any
22 evidence showing that DACA specifically caused the state
23 to increase its expenditures. This Court found standing
24 to be purely speculative in that case and rejected
25 Mississippi's challenge.

1 Importantly, Mississippi, like the plaintiffs
2 in this case, had not relied on expenditures due to the
3 issuance of driver's licenses, the basis for standing in
4 this Court's 2015 DAPA decision.

5 This case is also very similar to the recent
6 decisions by the Sixth Circuit in the immigration
7 priorities cases. There have been two recent decisions
8 by the Sixth Circuit, both by Judge Sutton, the second
9 one issued just yesterday. This is a case where the
10 plaintiff states have challenged a DHS memo setting
11 immigration enforcement priorities. The states there,
12 like the states here, contend that the guidance about how
13 to remove people from the United States causes the states
14 to spend more money on social services. The Sixth
15 Circuit concluded that the plaintiffs' basis for standing
16 was entirely speculative.

17 It's important that in this case the
18 plaintiffs --

19 JUDGE ENGELHARDT: You think your best case on
20 standing is Crane v Johnson?

21 MR. BOYNTON: Yes, Your Honor.

22 JUDGE ENGELHARDT: The 2015 case?

23 MR. BOYNTON: Yes, Your Honor. The Sixth
24 Circuit decisions are also quite helpful.

25 JUDGE ENGELHARDT: So, I'm looking at your

1 brief; you don't really talk about that case.

2 MR. BOYNTON: Crane v Johnson, I believe we
3 cited. We don't focus on it. That's part of the reason
4 I wanted to --

5 JUDGE ENGELHARDT: You don't mention it
6 anywhere in your standing discussion.

7 MR. BOYNTON: The argument we've made, Your
8 Honor --

9 JUDGE ENGELHARDT: I'm not saying it's waived.
10 I'm just kind of surprised that your lead case isn't even
11 in your brief.

12 MR. BOYNTON: Your Honor, the argument we made
13 in our brief is very similar to the argument accepted in
14 Crane v Johnson. I take your point that we didn't focus
15 as much on it, but the argument we made was that the
16 plaintiffs had failed to put forward evidence documenting
17 their expenses.

18 The approach the plaintiffs took here is very
19 different from what they did in the DAPA case. There,
20 this Court relied on driver's license expenditures. That
21 was important, because under Texas law, Texas issued
22 driver's licenses to people who are granted deferred
23 action. That's not the case with respect to the
24 expenditures that the plaintiffs are pointing to here.
25 They're pointing to emergency medical care expenses --

1 JUDGE ENGELHARDT: I'll agree with you that
2 it's interesting that the state doesn't make that
3 argument here. It would have been easy to just -- for us
4 to just follow our previous ruling in the DAPA case. I'm
5 sure we'll ask the State of Texas that question when
6 they're up here.

7 But do you doubt that there's a similar injury
8 in this case? Wouldn't you have the same driver's
9 license problems with the DACA population as we do with
10 the DAPA population?

11 MR. BOYNTON: So, we don't have any evidence
12 in the --

13 JUDGE ENGELHARDT: Or, in other words, is your
14 argument just purely a forfeiture argument, or do you
15 think it's actually factually different?

16 MR. BOYNTON: There's the forfeiture argument
17 and -- I don't know factually whether the argument would
18 be the same or not. It would depend on, you know,
19 expenses incurred by the states here. But the bottom
20 line for us is that the states haven't raised this issue
21 and have forfeited it.

22 Because of the way the plaintiffs have
23 attempted to show standing, they necessarily have to show
24 that DACA causes more people to be in the United States
25 and that if DACA were rescinded these people would

1 voluntarily leave the United States. That's the only way
2 they get to a decrease in expenditures. And they've not
3 made that showing, they've not put in any --

4 JUDGE ENGELHARDT: But you all had. That's
5 the Wong [ph] survey. They didn't need to have the
6 evidence because -- I'm not saying the United States. I
7 think it was New Jersey.

8 MR. BOYNTON: The intervenors.

9 JUDGE ENGELHARDT: Right.

10 MR. BOYNTON: Correct.

11 JUDGE ENGELHARDT: They don't need to present
12 evidence when you guys present it for them.

13 MR. BOYNTON: So, the intervenors also
14 presented evidence that the Wong survey is not
15 dispositive on this point, that it called for people to
16 speculate and there were methodological flaws.

17 At the end of the day, interestingly --

18 JUDGE ENGELHARDT: Well, wait a minute. It's
19 causing the beneficiaries to speculate on their own
20 behavior if DACA were to be repealed. That's the whole
21 question that you're proposing. I mean, you literally
22 said nobody would leave, and the survey says some
23 20 percent of the people would leave. Why is that not
24 directly responsive?

25 MR. BOYNTON: Because even there, it's

1 speculative about what people would do. This was a
2 survey conducted five years ago that asked people to
3 hypothesize what would happen, and so it's necessarily
4 speculative.

5 JUDGE ENGELHARDT: What are the experts on the
6 other side doing but speculating?

7 MR. BOYNTON: The experts --

8 JUDGE ENGELHARDT: In other words, the experts
9 speculate as to what other people do. The survey, I
10 suppose, speculates on what the survey recipients
11 themselves do. If we're going to rely on anything,
12 wouldn't we rely on the people themselves?

13 MR. BOYNTON: The district judge looked at the
14 evidence on both sides, Your Honor, both the survey, as
15 well as the evidence put in by the intervenors on the
16 other side, and the district court concluded that there
17 was a dispute of fact as to whether DACA recipients would
18 in fact leave the country. The court then went on to
19 grant summary judgment --

20 JUDGE ENGELHARDT: So, in your view, how would
21 the state satisfy this? If it's too speculative for the
22 beneficiaries themselves to say that they would leave,
23 then I assume, (indiscernible) even more speculative for
24 an expert to say what some other person would. It seems
25 like you're saying there's just no way for there ever to

1 be standing in a case like this for a state.

2 MR. BOYNTON: It's very difficult for a state
3 to try and establish standing in this way. And this is a
4 point that Judge Sutton makes in the Sixth Circuit
5 decision, about how inherently a question like this,
6 calls for speculation.

7 But even if the states could --

8 JUDGE ENGELHARDT: What's more speculative,
9 the theory of standing and causation here, or the theory
10 of causation in Massachusetts v EPA?

11 MR. BOYNTON: So, I think this one is more
12 speculative, Your Honor, than that one. Because there's
13 just no way to know -- you're talking about a population
14 here that -- DACA recipients -- with deep ties to this
15 country. They've been continuously residing in the
16 country since 2007 and are enmeshed in their communities.
17 And so, the prospect that they would just voluntarily
18 leave the country is quite speculative.

19 Even if it weren't, and even if the Court
20 were to conclude, and the district court were to have
21 concluded that some DACA recipients would leave, the
22 court failed to take into account another aspect of the
23 health care expenditure issue. The court didn't take
24 into account the fact that DACA causes recipients to have
25 private insurance at greater rates than they would

1 otherwise. And having private insurance offsets the same
2 health care costs that the state pointed to.

3 JUDGE ENGELHARDT: So, what's your theory then
4 as to why, despite those, you know, reasonable points
5 that you're making, 22.3 percent of this 3,000 or so
6 population of survey recipients nevertheless said that
7 they were likely or very likely to leave in the event or
8 repeal?

9 MR. BOYNTON: It's hard to know, Your Honor.
10 The intervenors put in evidence that the way the
11 questions were structured led people to be predisposed to
12 answering that way. But it's very -- at the end of the
13 day, it's almost impossible to know what would happen.

14 JUDGE ENGELHARDT: Okay. I mean, I'm
15 familiar, you know, when you have political polling and
16 push polls and how you order questions can affect the
17 response rate when we're talking about questions about
18 political beliefs and whatnot. This is a question about,
19 literally, your entire life, right. As you say, you
20 know, these people who are accustomed to living here,
21 this is a pretty profound question for them to get wrong.
22 I think that's basically your theory, that they answered
23 this question about their own lives incorrectly.

24 MR. BOYNTON: I don't know that it's saying
25 that they got it wrong. The question necessarily calls

1 for speculation, hypothetization [sic] about what someone
2 would do, and for that reason we believe it's too
3 speculative.

4 I'd like to pivot, if I could, to the merits,
5 and I'd like to -- I'd like to jump to the substantive
6 APA claims.

7 The Supreme Court, in Regents, made very clear
8 that when you're evaluating DACA, it is important to look
9 at the component parts of DACA. The premise of the
10 court's decision in Regents was that DHS failed to
11 consider that it could have moved forward with a program
12 of forbearance only, that there was not a legal
13 impediment to a program of forbearance. We think that's
14 very well established, that the forbearance --

15 JUDGE HO: You're using the term
16 "forbearance," but this isn't a case that's entirely
17 about forbearance. This isn't a prosecutorial discretion
18 case. There are certain -- in fact, we just made
19 reference to it, you were talking about the medical
20 insurance -- certain rights that come with employment and
21 whatnot that are in addition to a simple forbearance
22 decision. Isn't that correct? It makes a different.

23 MR. BOYNTON: That is correct, Your Honor,
24 this is not a case entirely about forbearance, but it is
25 partially, and in large measure, about forbearance. And

1 I plan to talk about the different components of DACA,
2 but I think it's helpful, in considering the lawfulness
3 of DACA, to think about the lawfulness of each component
4 part. And so, I'd like to start with forbearance and
5 then turn quickly, if I could, to other aspects.

6 The forbearance aspect of DACA is simply a
7 form of prioritization. DHS has limited resources. It's
8 unable to remove 11 million people in the country. It
9 has to decide who it's going to target first. It has
10 some priorities that say these people are high
11 priorities. Deferred action is a way of saying other
12 groups of people are very low priorities.

13 It's well-established that agencies can
14 exercise this kind of discretion in the face of limited
15 resources. And the statute specifically gives the
16 DHS Secretary authority to establish immigration
17 enforcement priorities. That's Section 2025 of
18 Title 8. And then, the Supreme Court's decision in
19 Regents also makes this quite clear.

20 More broadly, the Supreme Court has recognized
21 that deferred action is an authority that DHS has
22 exercised for many years. The 1999 decision in Reno v
23 American Arab Anti-Discrimination Committee, notes that
24 DHS had -- this was 23 years ago. At that point, DHS had
25 been engaged in deferred action for quite a long period

1 of time.

2 Additionally, there are numerous statutes
3 within the INA that make reference to deferred action,
4 including the Real ID Act, which necessarily recognizes
5 that deferred action is a form of action DHS can engage
6 in because it says that states can issue driver's
7 licenses to people who have deferred action.

8 So, with that, let me pivot to work
9 authorization, which is a critical aspect of DACA.

10 Work authorization is authorized expressly by
11 regulation and by statute. In 1981, INS promulgated a
12 regulation. It's now 8 CFR 274a.12(c)(14), that says
13 that deferred action recipients generally, not DACA
14 specifically, deferred action recipients can seek and
15 obtain work authorization.

16 The light blocks my red light here, Your
17 Honor, so I see that the red light has gone off. I'm
18 happy to continue to finish this question or to sit down.

19 CHIEF JUDGE RICHMAN: Well, I gather you have
20 quite a list there. You've saved some time for rebuttal.

21 MR. BOYNTON: Okay.

22 CHIEF JUDGE RICHMAN: We have others to
23 present arguments on your side.

24 MR. BOYNTON: Okay. Thank you, Your Honor.

25 MS. PERALES: May it please the Court, Nina

1 Perales for DACA recipient appellants. I will use my
2 time to discuss standing and make two main points.

3 First, the district court committed reversible
4 error when it entered summary judgment in favor of
5 plaintiffs after concluding that the facts related to
6 standing were in dispute.

7 Second, Texas 1, the DAPA case, does not
8 control the outcome here because the evidence of injury
9 in fact and causation offered by Texas is qualitatively
10 different here and does not rise to the level of that in
11 Texas 1, the DAPA, or parents' case.

12 In its summary judgment opinion, the district
13 court found that defendant intervenors' contrary evidence
14 related to plaintiff's standing created a factual
15 dispute. For this reason, this Court should reverse and
16 remand for the district court to determine its
17 jurisdiction. This would be after a trial. The district
18 court observed that the contrary evidence creates --

19 CHIEF JUDGE RICHMAN: That's what I have a
20 question about. You say you can't determine standing
21 until after a trial? I thought there were cases that say
22 if you -- it's colorable, basically, you proceed with the
23 lawsuit and that standing -- you don't wait till the very
24 end, based on ultimate fact issues, to decide if there's
25 standing.

1 MS. PERALES: So, Your Honor, a couple of
2 answers to that. Lujan tells us that the burden to show
3 standing gets more difficult, right. This is not a
4 preliminary injunction case. This is actually cross
5 motions for summary judgment. The district court
6 improperly relied on cases in which the plaintiffs were
7 fending off, or were the non-movants, in summary
8 judgment. And so, the plaintiffs' burden, then they are
9 the non-movants, is to place these issues in the realm of
10 disputed facts.

11 But here, the court entered summary judgment
12 against us, recognizing that we had placed the facts in
13 dispute. The only way that plaintiffs properly get
14 summary judgment in their favor on standing at this stage
15 is if we do not put the facts in dispute. But the
16 court's own words say that we have disputed facts. At
17 ROA.25195, the court says we created a fact issue when
18 the evidence is viewed in favor of the defendant
19 intervenors who were the non-movants for the purpose of
20 this motion.

21 The court also ruled in its denial of our
22 Daubert motion, which was the same day that the court
23 issued its summary judgment decision in 2021, the court
24 said when denying our Daubert motion, that cross-
25 examination is the appropriate means to probe experts'

1 evidence and that our criticisms go to the weight of the
2 expert testimony. That's --

3 JUDGE HO: Perhaps you're going to get to it,
4 but didn't the court find standing on a few different
5 grounds, not simply the disputed grounds that you're
6 referencing?

7 MS. PERALES: No, Your Honor, it did not. The
8 court found that the disputed standing facts were those
9 that were -- that we contend are material. That is,
10 injury in fact, whether DACA recipients affect or injure
11 Texas by distorting the labor market; that was one
12 disputed fact found by the court.

13 The other one is traceability, causation, and
14 redressability, whether DACA recipients would leave the
15 country if they lost their DACA. These were facts that
16 the court itself found to be in dispute. And the Daubert
17 language that it used is at ROA 25159. It was error for
18 the district court to rely on the disputed facts to deny
19 our motion for summary judgment, but then grant the
20 plaintiffs' motion for summary judgment. If there are
21 disputed facts, then the court may have properly denied
22 our motion for summary judgment, although we contend it
23 did not.

24 But the step further, to grant the plaintiffs'
25 motion for summary judgment on standing was error here.

1 Judge Ho wrote, two weeks ago in Garza-Flores v Mayorkas,
2 the physical present citizenship case, that at the
3 summary judgment stage the court is obliged not to weigh
4 conflicting evidence, assess the credibility of
5 affidavits, or attempt to reconcile the conflicting
6 evidence. After the court recognized that these standing
7 facts were in dispute it could not then go further and
8 weigh the conflicting evidence. Which is, either what
9 the court did, improperly, was make these determinations
10 on its own; or in the alternative, the court was using
11 the wrong standard, and it was using the preliminary
12 injunction standard, where you just have to sort of get
13 these facts out there with some evidence. But you don't
14 have to show that there's no genuine issue of material
15 fact, which is the situation that we have here.

16 With respect to labor market distortion --

17 JUDGE ENGELHARDT: One difference, of course,
18 about this case, is you've got the Massachusetts v EPA
19 framework, right? That's very different from an
20 individualized plaintiff.

21 MS. PERALES: It certainly is, Your Honor.
22 And if you're referring to special solicitude, special
23 solicitude adds to the list of the types of injuries that
24 a state could show, right. That's a way to get standing,
25 is to show, for example, that --

1 JUDGE ENGELHARDT: And not just that, but then
2 a dramatically reduced traceability and redressability
3 analysis that individuals would have to prove.

4 MS. PERALES: Even if it is reduced, Your
5 Honor, there still has to be injury in fact.
6 Massachusetts pointed to the erosion of its beaches.
7 Here, the fact whether there was injury of fact was the
8 disputed fact. Right? The allegation was labor market
9 distortion as a result of DACA recipients in Texas, who
10 are less than one-third of 1 percent of the Texas
11 population, getting work authorization and becoming
12 employed. But the district court itself found that there
13 was a fact dispute whether there was labor market
14 distortion. The district court concluded only that there
15 was the existence of a larger eligible workforce, but
16 that didn't mean that there was any injury to Texas.

17 And just to quote Judge Sutton from Arizona v
18 Biden, the district court did not connect the dots
19 between the larger workforce and any injury to the
20 workers. We are six years in to DACA at the time that
21 the summary judgment motions were filed, and because of
22 that, it was incumbent on Texas to get that fact into
23 dispute by showing, either an affect on the workforce at
24 large, or an affect on any employer or any employee. And
25 it did not. There was no evidence of that.

1 I would like to say, just to use my last few
2 seconds, with respect to pocketbook injuries with respect
3 to health care costs and also social services education,
4 Texas provided no evidence that DACA increased the use of
5 state services. The court did recognize, however, that
6 DACA recipients who had been here since 2007, if there
7 was any evidence that a DACA recipient had used an
8 education dollar or social service dollar, which there
9 was not in this case, that that would be because they had
10 been here anyway. So, again, California v Texas, a
11 complete lack of traceability.

12 The last point that I'd like to make, with the
13 Court's indulgence, is that Dr. Perryman, who was our
14 expert, and which Texas says measured social service
15 costs, did not. He testified he was not aware of any
16 costs to the state of Texas as a result of DACA, and that
17 he provided no evidence of such costs in his offset
18 analysis. He simply did not testify to costs.

19 Thank you, Your Honor.

20 CHIEF JUDGE RICHMAN: I do not want to
21 mispronounce your name, so I'm going to let you tell us.

22 MR. FEIGENBAUM: It's Jeremy Feigenbaum, for
23 New Jersey.

24 May it please the Court, with my limited time
25 this morning I'd like to focus our attention on an

1 independent error by the district court, the vacatur of
2 the 2012 memorandum.

3 Texas chose not to file a pre-enforcement
4 lawsuit in this case, and to instead challenge DACA only
5 years after the policy issued. That choice matters. Now
6 that we're a full decade later, eliminating DACA would
7 cause extraordinary disruption for recipients, employers,
8 their citizen children, and states. And on these extreme
9 facts, remand without vacatur was appropriate instead.

10 I'll begin with that disruption, which this
11 Court's cases, I think, teach, is a central component of
12 the vacatur inquiry.

13 So, the first point is the reliance interest.
14 Obviously, the Supreme Court, in Regents, went into some
15 detail about the reliance interests that have developed
16 based on DACA and its existence, for now ten years. And
17 there are a number of examples in the record.

18 So, it's not just about the recipients, it's
19 also about the businesses that have employed DACA
20 recipients. DACA recipients have valid employment
21 authorization documents that they present to the
22 businesses. The businesses train them, hire them,
23 sometimes in hard to fill roles. And having vacatur upon
24 a final judgment would work extraordinary hardship to
25 businesses, as well as the military, as well as public

1 employers like the State of New Jersey, who have been
2 counting on DACA recipients to serve as our doctors, to
3 serve in our armed forces, et cetera.

4 Those are the sorts of interests that Regents
5 identifies and that I think go to the heartland of the
6 disruption inquiry that's a core part of what this Court
7 has looked at repeatedly in cases like Texas Association
8 of Manufacturers, cases like Southwest Services, and so
9 on.

10 The stay that the district court issued does
11 not resolve the issue of whether vacatur would be
12 appropriate. The stay that the district court issued
13 pending appeal simply potentially pushes off a deadline
14 in which that we'll have that sort of disruption. So,
15 the moment there's a final judgment, if the vacatur were
16 to hold, the moment there's a final judgment we would
17 have an individual serving in the armed forces who's a
18 DACA recipient on a Monday who'd no longer be able to
19 serve there on a Tuesday.

20 That's the sort of disruption that a post
21 enforcement challenge like this can engender, and that's
22 the sort of challenge that I think the district court
23 nowhere grappled with in its order. I think, to its
24 credit, the district court grappled with a number of
25 these reliance interests and equitable interests in

1 crafting its stay pending appeal. But at no point, in
2 deciding on the remedy of vacatur and in deciding on the
3 remedy of nationwide injunction, did the district court
4 expressly, or from my perspective even implicitly,
5 consider these sorts of equitable considerations. And I
6 think that that choice ultimately matters.

7 Because it's on the district court, in the
8 first instance, to consider these sorts of questions,
9 like the disruption that will be wrought, or the
10 appropriate scope of relief in the case. And the
11 district court did none of that in this unusual, sort of
12 ten years later challenge that we're facing.

13 One of the questions that comes up, of course,
14 in remand without vacatur, is whether there are available
15 options to the agency on remand. I think that the D.C.
16 circuit's opinion by then Judge Cavanaugh in EME Homer,
17 is the most instructive on this score. In that case, the
18 D.C. circuit found that there were substantive violations
19 by the EPA about the emissions limits that it had imposed
20 on a number of states under the Clean Air Act. And
21 despite making a finding about the substantive invalidity
22 of the limits, then Judge Cavanaugh's opinion, for the
23 Court, specifically said that remand without vacatur
24 would be appropriate anyway on the basis that there were
25 some options still available to the agency even if the

1 particular choice of what the agency had done was
2 unlawful.

3 And I think as the United States was beginning
4 to talk about, there are all range of options still
5 available to the United States in this case, including
6 many that Regents particularly identified. Whether that
7 comes to forbearance, or as the proposed rule making
8 indicates, decoupling forbearance with aspects of work
9 authorization but still including work authorization, or
10 taking into account particular reliance interests at the
11 level of the agency, these are all options still
12 available to the agency on remand and vacatur would lead
13 to an extraordinary disruption, including to forbearance,
14 including to ongoing employment, including to reliance
15 interests, that only remand without vacatur, I think,
16 properly achieves.

17 And so, when the Supreme Court says in Regents
18 that, whatever the court's view of the merits, that's
19 just the beginning of the remedial inquiry, because
20 ultimately, it's for the agency to make the important
21 remaining policy choices. I do think that that's the
22 sort of thing that justifies remand without vacatur. And
23 it's not every day you see a Supreme Court opinion
24 acknowledging the very reliance interests that we're
25 talking about in this very case, but I think that that

1 has real force and impact in this case.

2 The other point I would make, is if this
3 Court's not prepared to outright say that remand without
4 vacatur would be the appropriate remedy at the end of the
5 case, the Court should still vacate the remedial order
6 that was issued below and remand that. There are a
7 number of different issues that have arisen on appeal
8 about the scope of that remedial order. So, there has
9 been, I think, 28 (j) letters flying back and forth
10 between Texas and the United States about the scope of
11 Aleman Gonzalez and the recent decision in Biden v Texas.

12 And I don't think I can say it much better
13 than Justice Barrett did in her dissent, where she said,
14 in Biden, that a number of these questions are hard, and
15 as a court of review, not first view, these are the sorts
16 of issues you'd want the court that actually issues the
17 remedy to think about in the first instance. And only
18 vacating the remedial order and remanding that to the
19 district court allows Judge Hanen, in the first instance,
20 to consider the import of Aleman and its application to
21 this case.

22 And if this Court does take that step, then I
23 think there are two additional things it should ask the
24 court to do. It should ask the court specifically to
25 consider the disruption that the district court never

1 considered, and it should require the court to make the
2 usual findings under the normal four-part test about
3 scope of remedy, particularly given Judge Sutton's recent
4 concurrence in Arizona v Biden, which really emphasizes
5 some of the questions a district court needs to think
6 about.

7 I see my time has expired. Thank you, Your
8 Honor.

9 CHIEF JUDGE RICHMAN: Mr. Stone.

10 MR. STONE: Good morning, Chief Judge Richman,
11 and it may it please the Court.

12 In 2015, this Court held that DAPA and
13 extended DACA violated the APA. DACA was the foundation
14 for those programs. This Court should come to the same
15 result.

16 I've heard the panel discussing standing, the
17 summary judgment standard, and what's in the record that
18 sort of supports Texas' standing to begin with, so I'd
19 like to start there.

20 The relevant question here for summary
21 judgment is whether or not, first, there's sufficient
22 evidence in the record that Texas has met the
23 constitutional minimum of standing. Which is to say,
24 that we've shown at least a dollar of expenditures that
25 would be remedied by the removal of DACA, and in fact

1 whether we've shown that some individual who receives
2 that sort of spending under DACA will leave the United
3 States. Those are the two propositions, that if there
4 are in fact sufficient evidence in the record and there
5 is no evidence shown that either of those numbers are
6 zero, for which summary judgment on standing is
7 appropriate for the plaintiff states. There's plenty of
8 evidence for each.

9 Speaking first about Texas' expenditures under
10 DACA, both sides admitted evidence totaling in the
11 hundreds of millions of dollars of costs that Texas
12 spends on health care alone. So, to begin with, Monica
13 Smoot, one of Texas' experts, just looking at three
14 Medicaid programs, estimated approximately over
15 \$100 million for each of five separate fiscal years.

16 Ray Perryman [ph], intervenors' expert,
17 identified \$250 million of costs attributable to Texas'
18 expenditures on DACA recipients. And to be very clear,
19 he specifically said that those costs were incurred in
20 part by the State of Texas because of DACA recipients.
21 That's in the record at page 14304 to 05. So, when my
22 friend on the other side says that their expert never
23 attributed those costs to DACA recipients in specific,
24 that's simply flat wrong.

25 Additionally, talking about the evidence in

1 the record showing that some DACA recipients would leave
2 the state, some of the approximately 115,000, appears to
3 be the number the sides agree on, DACA recipients would
4 leave the state, there is, as Your Honors pointed out, a
5 survey conducted by an expert by the appellants
6 indicating that 22.3 percent of individuals who had DACA
7 describe themselves as likely or very likely to leave,
8 another 27.1 percent said they were neither likely, nor
9 unlikely.

10 There are 23 declarations by the intervenors
11 using materially similar language describing the effect
12 of DACA on their ability to live in the United States
13 where they all say that it is critical to their ability
14 to live and work in the United States. An ordinary
15 person who describes something as critical to their
16 ability to live somewhere undoubtedly is saying something
17 like, but for this thing it would be very unlikely that I
18 can continue to go on. If I said that my oral argument
19 preparation folder here was critical, you'd think I'd be
20 highly impaired without it. So, 23 declarations to that
21 effect, again, submitted by appellants.

22 And then, of course, the Texas state
23 demographer observed, in his expert capacity, that it
24 would be reasonable for an individual -- it would be
25 reasonable for someone to conclude that at least some

1 DACA recipients, if DACA were enjoined or otherwise no
2 longer available, would leave the state. There is
3 nothing in the record that suggests the number of DACA
4 recipients would be zero. That is what would be a
5 genuine issue of material fact, because again, the
6 constitutional minimal quantum for standing here is a
7 dollar of spending that would be remedied by the
8 injunction of DACA. There is no material fact here.

9 If the Court doesn't have any questions on
10 standing, I'm happy to move on to my merits argument.

11 JUDGE ENGELHARDT: Why didn't the State of
12 Texas make the same argument that was embraced in the
13 DAPA precedent?

14 MR. STONE: Candidly, Your Honor, I can't
15 speak as to the litigation strategy that the trial
16 lawyers chose regarding this below. Of course, as a
17 factual matter -- and I'm not raising this to you now --
18 as a factual matter, undoubtedly the driver's license
19 expenditures still exist. But these hundreds of millions
20 of dollars of costs which both sides' expert directly
21 attribute to DACA recipients, plainly are
22 constitutionally sufficient as well.

23 And to the extent there even were some sort of
24 causal question, this Court's decision in Texas DAPA
25 regarding special solicitude plainly suffices. For the

1 same reasons in Texas DAPAs, the states had special
2 solicitude. We have both a procedural right to challenge
3 the act in question, the same procedural right in fact,
4 an APA challenge; and a quasi-sovereign interest, namely,
5 the interests that Texas and the other states surrendered
6 to the union in being able to pass and enforce their own
7 immigration laws.

8 So, again, just comparing this as a benchmark
9 to Massachusetts v EPA, where the standing, sort of chain
10 and causation there approved of, was that if EPA
11 regulated carbon, individuals would buy lower emitting
12 cars, which would reduce domestic emissions, global
13 emissions, and then preserve Massachusetts' coastline.
14 The evidence in this record is far more concrete, the
15 chain is far shorter and far more robust.

16 So, turning forward to the merits arguments.
17 The merits arguments in this case are easy, precisely
18 because they're almost to the individual provision
19 controlled by Texas DAPA. The federal government relies
20 on three statutory provisions that they say give the
21 secretary the unbounded authority to create what, in
22 Regents, the Supreme Court called an affirmative program
23 for affirmative immigration relief. Not merely a
24 forbearance policy, but a program for affirmative relief.

25 They rely on three statutory citations, which

1 are the exact same citations and sections that this Court
2 enumerated and rejected in Texas DAPA. Those no more
3 authorize the secretary to create a power -- to have the
4 power to create DACA, than DAPA.

5 They then turn to a variety of acts of sort of
6 enforcement history or enforcement discretion.
7 Basically, past practice. This Court, in Texas DAPA,
8 said explicitly, past practice does not create power in
9 the executive.

10 Then it turned to those past examples, special
11 including Family Fairness, upon which the federal
12 government relies so heavily, and says, well, these other
13 programs, including Family Fairness, they tended to be
14 for specific geographic areas, or in response to
15 disasters, were limited in some way like that. And that
16 Family Fairness was at least interstitial to an already
17 existing -- to a statutory scheme for family
18 reunification visas.

19 This Court rejected the comparison of Family
20 Fairness to DAPA, because as of 2015, it had noticed that
21 Congress had rejected the Dream Act repeatedly. Here we
22 are, seven years later; Congress has rejected the Dream
23 Act in every congress since that's been proposed. To the
24 extent there's a comparison between the two programs
25 based on those criteria, DACA is a much easier case

1 because of the intervening rejections Congress has made
2 regarding something along the lines of the Dream Act or
3 some statutory basis for DACA.

4 And to turn just briefly, because it came up
5 towards the end, about the Section 1252(f)(1) question
6 presented in Biden v Texas. This Court need not be
7 disturbed by that for at least two reasons.

8 First, I'll get to the merits. The merits
9 reason is 1252(f)(1) only limits a court's power to issue
10 injunctive relief enjoining or restraining the operation
11 of Part 4 of subchapter 2. Part 4 of the INA in
12 subchapter 2 are provisions related to removal,
13 deportation, things of this nature. Texas and the
14 plaintiff states, in complaint paragraph 10, expressly
15 disclaim they're not seeking relief that requires the
16 executive to deport, remove, or otherwise take any sort
17 of offensive immigration action against a particular
18 individual. The district court's permanent injunction
19 specifically noted that for clarity, that it was not
20 obligating the federal government to do that either.

21 Beyond that, beyond the fact that that's not,
22 what's sort of the gravamen of our challenges, or
23 challenges that nothing in the INA provides this
24 affirmative power, the things that we complain about are
25 the sort of obviation of the unlawful presence bar and

1 the giving of lawful presence. That section occurs in
2 part 2. The illegal granting of workplace -- of the
3 authorization to work, that's in Section 1324(a), that
4 occurs in part 8. So, they're simply outside the scope
5 of 1252(f)(1) on its own terms.

6 And more fundamentally, the United States
7 appellants, at minimum, were on notice of the
8 potentiality for this issue, 1252(f)(1), when the court
9 in Aleman Gonzalez added that question presented in
10 August of 2021. They did not raise it in their opening
11 brief before this Court, much less the district court,
12 even though they cited 1252(g), the very next provision.
13 They did not raise it in their reply brief in March of
14 this year. And instead, they waited to raise it in a
15 28(j) letter filed after the close of business the Friday
16 before a holiday weekend before oral argument.

17 This Court doesn't address issues raised for
18 the first time in reply briefs, let alone in 28(j)
19 letters. So, because the one thing we know from Biden v
20 Texas is that 1252(f)(1) is not a subject matter
21 jurisdictional provision, it can be waived, like anything
22 else, and the United States and other appellants have
23 simply waived -- forfeited it here. And because of that
24 forfeiture, this Court simply doesn't need to address it,
25 let alone remand to the district court for first

1 application.

2 If there are no further questions, I'm happy
3 to cede the balance of my time, but I want to give you an
4 opportunity if there's anything I can say to be useful.

5 Thank you.

6 MR. BOYNTON: Thank you, Your Honor. Let me
7 resume where I was discussing before with work
8 authorization.

9 So, there's a 1981 regulation that expressly
10 authorizes deferred action recipients to seek work
11 authorization. Five years later, Congress
12 comprehensively considered employment of undocumented
13 non-citizens in IRCA. It prohibited employers, for the
14 first time, from hiring, knowingly hiring unauthorized
15 aliens. Critically, IRCA defines what is an unauthorized
16 alien, and that's 1324a(h)(3).

17 And the definition there is very important
18 because it excludes from unauthorized aliens, LPRs, as
19 well as anyone granted work authorization, either by the
20 INA or by the attorney general, now the secretary. By
21 carving out both authorization by the INA or the attorney
22 general, the statute makes very clear that there is an
23 authority, by the then attorney general, now secretary,
24 to grant work authorization even if there is not a
25 specific INA provision that grants work authorization.

1 A year after IRCA, INS considered a petition
2 for rule making, someone was asking them to repeal their
3 regulation on the grounds that the attorney general
4 didn't have authority to grant work authorization. The
5 INS said Congress just confirmed in IRCA that the
6 attorney general has this authority. That was in 1987.
7 Congress has not taken any steps to alter that
8 understanding in the intervening years.

9 And in fact, other provisions of the INA make
10 clear that the secretary has independent work
11 authorization authority because it says in limited
12 circumstances work authorization cannot be granted.
13 Someone who's released, who's been detained and is
14 released, 1226(a)(3) says that that person can't be given
15 work authorization by the secretary. That would be
16 unnecessary if there weren't some residual authority.

17 JUDGE ENGELHARDT: Before your time runs out,
18 I want to ask sort of a different question about the
19 debate about the substantive power to do DACA.

20 I don't think I saw anywhere, any reference to
21 the pardon power.

22 MR. BOYNTON: Correct, Your Honor.

23 JUDGE ENGELHARDT: I take it that's because
24 there's no argument here that the President could have
25 done any of these things pursuant to the pardon power.

1 MR. BOYNTON: We've not relied on the pardon
2 power, Your Honor.

3 The other aspect of DACA that is discussed,
4 although it's not actually part of the 2012 memo, is
5 lawful presence. There are certain statutes that say
6 that individuals who are lawfully present can obtain
7 benefits, like Social Security, they're allowed to pay in
8 and then receive Social Security.

9 The 2012 DACA memo says nothing about lawful
10 presence. There's a statute that does, 1611(b)(2).
11 There's a regulation that governs Social Security, that's
12 8 CFR 1.3. But those have not been challenged by the
13 plaintiffs in this case. They're challenging only the
14 memo that says nothing about lawful presence. That's
15 different from the 2014 DAPA memo that did discuss lawful
16 presence. Here, the memo --

17 JUDGE ENGELHARDT: Does that contradict what
18 the Supreme Court said in Regents? I mean, similar
19 memos, and -- well, actually, the same --

20 MR. BOYNTON: Same memo.

21 JUDGE ENGELHARDT: And it was described by the
22 Supreme Court as not just a forbearance policy, but an
23 affirmative immigration rewrite, essentially.

24 MR. BOYNTON: The court certainly acknowledged
25 that there are benefits that flow from having deferred

1 action status. But the point I'm making here, is that
2 the plaintiffs have not challenged these statutes and
3 regulations that say that deferred action recipients
4 generally are lawfully present. Their only challenge is
5 to the DACA memo itself. And so, there has to be
6 something about granting deferred action to DACA
7 specifically that they're challenging.

8 And they rely a lot on the DAPA decision from
9 this Court, but as this Court noted in that case, that
10 was a very different program than DACA. It was orders of
11 magnitude bigger. It covered 4.3 million people, whereas
12 DACA only covers, at most, the estimate is 1.5, and there
13 are currently only 600,000 --

14 JUDGE ENGELHARDT: The memo expressly mentions
15 work authorization.

16 MR. BOYNTON: Correct. Work authorization is
17 mentioned in a sentence. There's nothing about lawful
18 presence in the memo.

19 I'd like to turn very quickly, if I may, to
20 severability. This is an issue that we raised in our
21 brief that the plaintiffs have never responded to. If
22 this Court were to find that some aspects of DACA are
23 lawful and some are unlawful, it should sever the
24 unlawful portions and leave in place the lawful portions.
25 That's uncontested in this case.

1 And then finally, on 1252(f)(1), there are
2 just a couple of points to make. In the Aleman Gonzalez
3 decision, which was very recently issued, the Supreme
4 Court changed its interpretation of 1252(f)(1). It
5 clarified, at least, the interpretation. And that's why
6 we didn't raise 1252(f)(1) until after Aleman Gonzalez,
7 and then after the Biden v Texas MPP decision that also
8 relied on 1252(f)(1).

9 So, we don't think there's a forfeiture issue
10 because there's intervening precedent. If there were a
11 forfeiture issue, we think the court below, if the
12 district court is deciding this in the first instance --

13 JUDGE ENGELHARDT: I'm not sure I understand
14 that forfeiture argument. I mean, even when -- I'm
15 trying to think of how many cases we have, there are
16 literally hundreds, where parties know that a case is --
17 an argument, sorry, a claim or argument is foreclosed by
18 Supreme Court precedent. They make it anyway,
19 specifically to preserve the argument in the event the
20 Supreme Court takes cert. So, I don't understand that.

21 MR. BOYNTON: So, I think that the district
22 court at least would have within its discretion to waive
23 any forfeiture, if there were a forfeiture concern here,
24 because of the intervening --

25 JUDGE ENGELHARDT: Okay. But that'd be a

1 little ticklish, for us to not find your argument
2 forfeited, when you just said earlier that the State of
3 Texas' argument about driver's license is forfeited.

4 MR. BOYNTON: Well --

5 JUDGE ENGELHARDT: I assume you agree, we have
6 to apply the same principles to both sides of the "v".

7 MR. BOYNTON: So, there at least a couple of
8 difference, Your Honor. One is, Texas isn't asserting
9 driver's license standing now, and hasn't put in any
10 evidence in the record. That's an evidence-based
11 argument. It was their burden at summary judgment to put
12 in the evidence. They haven't done it.

13 Second, there's been no intervening change in
14 the law. In fact, there was a 2015 decision they could
15 have relied on.

16 And then third, this is a jurisdictional
17 provision. The Supreme Court made clear in the Biden v
18 Texas case that it didn't affect the district court's
19 jurisdiction to hear the entire case, and thus, didn't
20 affect the Supreme Court's jurisdiction. But it is a
21 jurisdictional provision with respect to the remedy, and
22 the Supreme Court left open the question of whether it's
23 forfeitable. That's Footnote 4 of the MPP decision,
24 leaves that open. If that's an issue this Court is
25 interested in, and we think it is a jurisdictional issue,

1 we would be happy to provide briefing on that specific
2 question.

3 If the Court has no further questions, I see
4 I've exceeded my time, and I appreciate your patience
5 very much.

6 CHIEF JUDGE RICHMAN: Thank you, counsel, we
7 have your argument.

8 (Whereupon the proceeding was concluded.)
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CERTIFICATION PAGE FOR TAPE RECORDING

I, Cheryl McKinney, certify that the foregoing in a correct transcription from the tape recording of the proceedings in the above-entitled matter.

Please take note that I was not personally present for said recording and, therefore, due to the quality of the audiotape provided, inaudibles may have created inaccuracies in the transcription of said recording.

I further certify that I am neither counsel for, related to, not employed by any of the parties to the action in which this hearing was taken, and further that I am not financially or otherwise interested in the outcome of the action.



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1 STATE OF TEXAS)

2 COUNTY OF TRAVIS)

3 NOTARY PAGE

4 Before me, Brian Christopher, on this day
5 personally appeared Cheryl McKinney, known to me to be
6 the person whose name is subscribed to the foregoing
7 instrument and acknowledged to me that they executed
8 the same for the purpose and consideration therein
9 expressed.

10 Given under my hand and seal of office this 7th
11 day of November, 2022.

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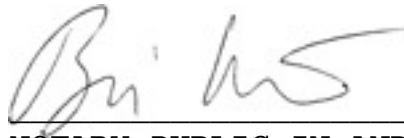
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NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
COMMISSION EXPIRES: 01/05/2025

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 27th day of April, 2023, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Nina Perales

Nina Perales